(4)

No. 85-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES GREER, Warden,
Menard Correctional Center,

Petitioner,

vs.

CHARLES "CHUCK" MILLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Should violations of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976) be reviewed under a less stringent standard than that established by *Chapman v. California*, 386 U.S. 18 (1967) in light of the fact that *Doyle* is a due process case, and claims of a denial of due process are subject to a general requirement that actual prejudice be shown?

II. Should *Chapman v. California*, 386 U.S. 18 (1967) be applied at all in federal habeas corpus proceedings, where the cost of strictly enforcing constitutional rights outweighs the benefits?

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OPINIONS AND JUDGMENTS BELOW

Certiorari was granted to review the *en banc* decision of the United States Court of Appeals for the Seventh Circuit in *United States ex rel. Miller v. Greer,* 789 F.2d 438 (7th Cir. 1986) (*en banc*), reprinted as Appendix A to the petition for a writ of certiorari. The panel decision, *United States ex rel. Miller v. Greer,* 772 F.2d 293 (7th Cir. 1985), is reprinted as Appendix B. The opinion of the district court, *United States ex rel. Miller v. Greer,* No. 83-3254 (C.D. Ill.), which is not reported, is reprinted

as Appendix C. The opinion of the Illinois Supreme Court is reported in *People v. Miller*, 96 Ill. 2d 385, 450 N.E. 2d 322 (1983) and reprinted as Appendix D. The opinion of the Illinois Appellate Court is reported in *People v. Miller*, 104 Ill. App. 3d 57, 432 N.E.2d 650 (4th Dist. 1982) and reprinted as Appendix E.

STATEMENT OF THE CASE

A. Introduction

Early on the morning of Saturday, February 9, 1980, Neil Gorsuch was killed by two shotgun blasts to the head at the Markham Bottoms bridge over Mauvaisterre Creek in rural Morgan County, Illinois. His body was discovered later that afternoon, partially submerged in the frozen creek. (Vol. V, 46-47) Randy Williams, a suspect in the case, was arrested the next morning while sitting in a borrowed car at a gas station. (Vol. IV, 28-29) Respondent Miller was with him at the time. He was not then a suspect, but he was also arrested when a pistol was found under the front seat of the car. (Vol. IV, 35-36) He was held for unlawful use of weapons. (Vol. IV, 51)

Once in custody, Randy Williams gave a statement implicating himself, respondent, and Clarence "Butch" Armstrong in the murder of Neil Gorsuch. (Vol. III, 18-23; Vol. IV, 60) All three were charged on February 11, 1980, with murder, kidnapping, aggravated kidnapping, and armed robbery. (C. 2-5; Vol. III, 29)

Because of antagonistic defenses, respondent's case was severed from the others and separate counsel were appointed. (Vol. II, 1-3) Randy Williams negotiated an agreement with the prosecution whereby, in exchange for his testimony at the trials of respondent and Armstrong, he

would plead guilty to kidnapping and the other charges would be dropped. (J.A. 6-7) Respondent's jury trial began on June 2, 1980, and lasted five days.

B. The Facts Underlying The Conviction

Randy Williams testified that on Friday night, February 8, 1980, he and his brother Rick borrowed a car from Rick's girlfriend, Chris Peterson, and went with Butch Armstrong to the Regulator, a tavern in Jacksonville, Illinois. (Vol. VI, 220-221) There they encountered Neil Gorsuch, who came to their table and spoke with them periodically. (Vol. VI, 222) Gorsuch was from Littleton, Illinois (Vol. III, 14), and had checked into the Motel 6 in Jacksonville earlier that day. (Vol. VIII, 47-48) At approximately 11:00 p.m., he called for a cab and was taken to the Regulator. (Vol. VIII, 114-115) When the Regulator closed at 1:30 a.m. on the morning of February 9, 1980, Gorsuch purchased a 12-pack of Busch beer from the bartender (Vol. VIII, 74), and left with the Williams brothers and Armstrong. (Vol. VI, 223) One of the waitresses testified that he was quite drunk. (Vol. VIII, 60)

Rick and Randy Williams both testified that the four men got into the car, and Rick drove to Chris Peterson's house where he got out. (Vol. VI, 168, 224) Chris Peterson testified that it was approximately 1:45 a.m. when Rick came home. (Vol. VI, 137) Randy took over behind the wheel, with Neil Gorsuch and Butch Armstrong in the back seat, and drove around town for a while. (Vol. VI, 224-225) During this time, Armstrong began beating Gorsuch. (Vol. VI, 225) Gorsuch said "he didn't mean to put his hand on Butch's leg" and pleaded with Armstrong to stop hitting him, but the beating continued. (Vol. VI, 495)

Randy drove to his house where all three got out of the car. (Vol. VI, 226) Armstrong had placed a stocking

cap on Gorsuch's head and pulled it down around his neck. He led Gorsuch by the arm into the house (Vol. VI, 227), and Randy brought in the 12-pack of Busch beer. (Vol. VI, 234) Gorsuch had defecated in his pants (Vol. VI, 231), so Armstrong sent him into the bathroom to clean up. (Vol. VI, 227) While Gorsuch was in the bathroom, Armstrong retrieved a shotgun from the closet and propped it up against the doorway in the dining room. He also took some shotgun shells from a box on top of the dresser, and a .32 pistol with one live round from the kitchen table, and put them in his coat pocket. (Vol. VI, 228-229) When Gorsuch came out of the bathroom, the stocking cap was still pulled down over his face. (Vol. VI, 232) Armstrong berated him for leaving feces on the bathroom floor, and then struck him in the back of the head with the butt of the shotgun. Gorsuch fell across a chair in the kitchen and hit his head on the table. Blood from the resulting wound ran onto the floor. (Vol. VI, 232-233)

All three men left Randy's house and got into the car. Gorsuch still had the stocking cap over his head, and Armstrong had him lay down on the back seat. Armstrong got into the front passenger seat carrying the shotgun, and Randy drove, following Armstrong's directions. (Vol. VI, 236-238, 241) At one point, Gorsuch sat up and asked to be taken to Motel 6, and Armstrong fired a shot from the .32 pistol into the back seat. (Vol. VI, 241, 496)

They eventually arrived at the Blue Ridge trailer court, and Armstrong directed Randy to stop at the trailer owned by Debbie Elliott. (Vol. VI, 242-243; Vol. VIII, 136) Randy stopped and shut the engine off, and Armstrong went in. (Vol. VI, 243) He came out a little while later, and shortly afterward respondent came out. (Vol. VI, 244-245) Several people who were in the trailer testified at trial that Armstrong arrived early on the morning of February 9, spoke briefly with respondent, and then left with him. (Vol. VI, 7-8; Vol. VIII, 140-141, 158-159, 171) Estimates as to the

time varied from 4:15 a.m. (Vol. VI, 8) to 6:30 a.m. (Vol. VIII, 182-183), but Teresa McDade was the only one who looked at a clock. (Vol. VIII, 160) She testified that it was 5:30 a.m. (Vol. VIII, 158)

With Armstrong in the front seat and respondent in the back with Gorsuch, Randy drove off, again following Armstrong's directions. (Vol. VI, 245, 247) Respondent asked Gorsuch if he had any money, and when Gorsuch replied that he did, respondent hit him and began going through his pockets. (Vol. VI, 252-253) Armstrong yelled that Gorsuch "was a dead man now", and said that "we was all three goin' to shoot this man." (Vol. VI, 254-255)

When they crossed the Markham Bottoms bridge Armstrong told Randy to stop. (Vol. VI, 255) As they got out of the car, Armstrong handed the shotgun to respondent and then pulled Gorsuch by the arm out of the back seat of the car. (Vol. VI, 257-259) He led Gorsuch to the rail of the bridge and pulled off the stocking cap. (Vol. VI, 259) Respondent then shot him in the back of the head. He fell, draped over the rail. (Vol. VI, 259-261) Respondent handed the shotgun to Armstrong, who reloaded it and fired, also hitting Gorsuch in the head. (Vol. VI, 260) Armstrong reloaded again and handed the shotgun to Randy, saying "Randy, you gotta' shoot this man, too, or we'll bury you with him." (Vol. VI, 261) Randy fired but missed. He opened the barrel of the gun and the shell ejected, hitting him in the chest and rolling under the bridge. (Vol. VI, 263) Armstrong threatened him again, reloaded, and handed the gun back to him. (Vol. VI, 262) He fired again, but was not sure if he hit the body. (Vol. VI, 263-264) Armstrong then flipped the body by the feet over the rail and into the creek. (Vol. VI, 264) Randy picked up three of the shells—the one that rolled under the bridge was left behind—and handed them to Armstrong. (Vol. VI, 264-265) They got back into the car and headed towards town. Along the way, respondent read aloud Gorsuch's name and

home town from his driver's license, and then threw the license, the billfold, and the shotgun shells out the window. (Vol. VI, 265-267)

Randy drove back to his house and put the shotgun in the living room. Then he took Armstrong home and dropped him off. (Vol. VI, 268) From there, he drove with respondent to his mother's restaurant, Dottie's Cafe. (Vol. VI, 269) Mrs. Williams testified that they arrived at approximately 6:15 a.m., drank coffee, and ate breakfast. (Vol. VI, 117-118) Randy drove respondent back to Debbie Elliott's trailer, and then returned to his mother's cafe. (Vol. VI, 271)

The body was discovered later that afternoon, at about 2:00 p.m. (Vol. V, 46-47) The Sheriff's Department was called (Vol. V, 55), and the coroner and deputy coroner arrived. (Vol. V, 62, 74-75) A Motel 6 matchbook and a key to room 80 were found near the body, and a .12 gauge shotgun shell was found under the bridge. (Vol. V, 66, 105, 107; Vol. VI, 18) There was a large amount of blood on and under the bridge. (Vol. V, 63) The body was taken to Passavant Hospital, and from there to Springfield Memorial Hospital, where an autopsy was performed two days later, on Monday, February 11, 1980. (Vol. V, 64, 79, 139) The time of death could not be determined because no one had taken a core temperature of the body at the scene. (Vol. V, 139-140) The cause of death was determined to be either of two contact or near-contact gunshot wounds to the head. (Vol. V, 150-152)

After he left his mother's cafe the second time, Randy Williams went to Bahan's, a tavern in Jacksonville. He was joined there that afternoon by respondent and Armstrong. (Vol. VI, 271-272) The three of them went to Randy's house to straighten up and wipe the blood stain from the dining room floor, after which they returned to Bahan's. (Vol. VI, 272-275) Armstrong went home a short time later. (Vol. VI, 276)

Rick Williams, his girlfriend Chris Peterson, and his mother and father came into Bahan's that afternoon, and went with Randy and respondent to Andy's, another tavern, for supper. (Vol. VI, 138, 169-170, 276-277) On the way over, Randy told Rick that he was "in big trouble" and needed to talk to him. (Vol. VI, 277) Rick, Randy, respondent, and Chris Peterson left Andy's and went to Randy's house. (Vol. VI, 170, 278) Rick and Randy stepped into the bedroom, and respondent followed them in. (Vol. VI, 171, 279) Chris Peterson remained in the dining room. (Vol. VI, 140-141) Randy told his brother that he, Armstrong, and respondent had killed the man they left the Regulator with the night before. (Vol. VI, 279-280) Rick and Randy both testified that respondent also said they had killed the man. (Vol. VI, 173, 280) Respondent added that Rick "better be quiet about it." (Vol. VI, 174) Randy suggested that if any of them were asked by the police about the incident, they should say that they left Gorsuch at the Regulator. (Vol. VI, 173)

Respondent left with Randy Williams in Chris Peterson's car, and they went to Harold's Club, another tavern. (Vol. VI, 280) The next morning, Sunday, February 10, 1980, they were arrested together at the Derby gas station at approximately 5:00 a.m. (Vol. IV, 44; Vol. VI, 281-282)

A .32 pistol was found on the floor of the car at the time of the arrest. (Vol. VIII, 106-107) Randy Williams made a statement within hours of his arrest implicating himself, respondent, and Armstrong. (Vol. IV, 60-61) Based on the information obtained from Randy, Sheriff's Deputies recovered a spent .32 caliber slug, a blood-stained piece of paper, and hair samples from the back seat of Chris Peterson's car (Vol. V, 134-135; Vol. VIII, 6-8); a blood-stained Busch beer 12-pack container from Randy's living room and a .12 gauge shotgun and some live shells from his bedroom (Vol. VI, 59; Vol. VII, 8; Vol. VIII, 6, 8-9); and three spent .12 gauge shells and Neil Gorsuch's driver's

license from the roadside about two miles from the Markham Bottoms bridge. (Vol. VIII, 11, 16) The .32 slug was found to have been fired from a gun having the same class characteristics as the pistol taken during the arrest, and the spent shells recovered from under the bridge and along the roadway were found to have been fired from the shotgun seized in Randy's bedroom. (Vol. VI, 70-73, 76-85) The hair sample taken from the car was determined to be consistent with standards taken from Neil Gorsuch (Vol. VI, 40-42), and the blood on the paper and the beer container was the same type as Gorsuch's, Type O. (Vol. VI, 46-47)

Respondent testified on his own behalf, and stated that when Butch Armstrong picked him up at Debbie Elliott's trailer, Neil Gorsuch was already dead. According to respondent, Armstrong told him he was in trouble and needed his advice. (J.A. 9) They left the trailer and got into the car with Randy Williams, and while they were driving around, Armstrong said that he and Randy had killed a man they picked up at the Regulator. (J.A. 10-11) Respondent asked why they killed him, and Armstrong said they had beaten him up and were afraid he would go to the police. (J.A. 13)

They drove to Randy's house, where Randy cleaned up the bathroom and a bloodstain on the dining room floor. (J.A. 11-12) Respondent asked what they had used to kill the man, and Randy Williams showed him a pair of "numchucks"—two wooden sticks linked at the ends with a cord. (J.A. 13-14) Since Randy's brother Rick was with them when they left the Regulator, Armstrong said that Rick should be told about the murder and warned to deny ever being in the company of the victim. (J.A. 14)

They got in the car and drove Butch Armstrong home. On the way, Armstrong asked respondent not to say anything about the murder to anyone, and respondent promised that he would not. (J.A. 15) After dropping Armstrong off, Randy and respondent drove to Dottie's Cafe for breakfast. (J.A. 16) From there, Randy drove respondent back to the trailer court. (J.A. 17)

Later that evening, respondent was with Rick and Randy Williams, their parents, and Chris Peterson at Bahan's, and from there they all walked over to Andy's. (J.A. 22-23) Respondent left Andy's with Rick, Randy, and Chris, and went to Randy's house. (J.A. 24) Rick and Randy left respondent and Chris in the dining room, and went into the bedroom to talk privately. Respondent joined them a few minutes later. Randy was telling Rick about the murder of Neil Gorsuch. Respondent said nothing. (J.A. 25) When they left the bedroom, Randy gave a demonstration of the use of numchucks. (J.A. 26) Afterwards, respondent and Randy went to Harold's Club, and from there to a party at a friend's house. (J.A. 26-27) They ended up at the Derby gas station, where they were both arrested. (J.A. 29)

The cross-examination of respondent began as follows:

Q. Mr. Miller, how old are you?

A. 23.

Q. Why didn't you tell this story to anybody when you got arrested?

MR. LEFFERS: Objection, Your Honor. May we approach the bench?

THE COURT: You may.

(Whereupon the following colloquy ensued out of the hearing of the jury:

MR. LEFFERS: Your Honor, I think this is an infringement of his exercise of his right to remain silent. At this point in time, I will ask for a mistrial—

THE COURT: What do you say, Mr. Parkinson?

MR. PARKINSON: Well, he has taken the stand and he is open to cross examination extensively. He is entitled to be questioned by the State as to why he

didn't talk to anybody about it at the time. It goes to his credibility and I don't think it's an improper question.

THE COURT: Have you got a case that says it's improper?

MR. LEFFERS: No, Your Honor. I didn't think Mr. Parkinson would ask that question, quite frankly.

THE COURT: I will deny your mistrial, your motion for mistrial, but I will sustain your objection. The jury will be instructed.

MR. LEFFERS: And that Mr. Parkinson desist.

THE COURT: I will do some checking during the time he is on the witness stand on Cross Examination and if I find where he can, I will let him ask the question.)

The objection will be sustained and the jury will be instructed to ignore that last question, for the time being.

You may continue, Mr. Parkinson.

(J.A. 31-32) At a later sidebar conference, the trial court indicated that it had found authority prohibiting that line of questioning (J.A. 43), and the prosecutor did not thereafter pursue it, or argue the matter to the jury in closing. At the end of the case, the jury was instructed to "disregard questions . . . to which objections were sustained." (J.A. 47)

The jury deliberated for six hours. (C. 12) Two hours into their deliberations, they sent a note to the trial court asking for the testimony of the witnesses establishing the time of respondent's arrival and departure from Debbie Elliott's trailer, and placing Armstrong at Bahan's on the afternoon of February 9, 1980. Counsel were consulted, and it was agreed that these questions should not be answered. (Vol. VII, 231) Verdicts were returned finding respondent guilty of murder, kidnapping, aggravated kidnapping, and robbery. (Vol. VII, 232)

C. The Post-Trial Proceeding

The State sought the death penalty, and a hearing was convened before the same jury that had determined respondent's guilt. (Vol. X, 3) At the conclusion of the hearing, the jury recommended imprisonment. (Vol. X, 81)

At the hearing on the post-trial motion, respondent argued that he was entitled to a new trial for several reasons, one being that the prosecutor's cross-examination violated the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976). (Vol. XI, 4-6) The trial court denied the motion, ruling on the *Doyle* issue that "I don't think it was error for the State to ask the question that was asked. The defendant's attorney immediately objected; the objection was sustained and maybe even erroneously, now, so that will be denied." (Vol. XI, 15) Respondent was sentenced to concurrent terms of eighty years for murder, thirty years for aggravated kidnapping, and seven years for robbery. (Vol. XI, 42) The kidnapping conviction was vacated. (Vol. XI, 16)

D. Direct And Collateral Review

The Illinois Appellate Court reversed respondent's convictions and remanded for a new trial, finding that the prosecutor's cross-examination violated the rule of *Doyle*. Applying *Chapman v. California*, 386 U.S. 18 (1967), the appellate court was unable to find the error harmless beyond a reasonable doubt because it characterized the trial as "essentially a credibility contest" between respondent and Randy Williams, and the reference to respondent's post-arrest silence "may have irreparably prejudiced him in the eyes of the jury." (App. to Pet. for Cert. at E-7) The State sought review in the Illinois Supreme Court, which reversed the appellate court, with one judge dissenting. Initially, the court rejected the State's argument that *Doyle* was inapplicable because the record did not reflect that respondent had been informed upon arrest of

his right to remain silent. It found that a police report contained in the common law record (C. 556) showed respondent was informed of his rights at the time of his arrest on the murder charge. (App. to Pet. for Cert. at D-8-9) On the harmless error question, the court determined that the State had satisfied its burden under *Chapman* since the error was a single, isolated incident during a five-day trial and the evidence was sufficient to support the verdict. (App. to Pet. for Cert. at D-10-11)

Respondent then petitioned for federal habeas corpus relief. After reviewing the record and applying the *Chapman* standard, the district court found the error harmless beyond a reasonable doubt (App. to Pet. for Cert. at C-4), but a panel of the Court of Appeals, in a split decision, disagreed. It held that for an error to be harmless under *Chapman*, the evidence of guilt must be overwhelming. (App. to Pet. for Cert. at B-7) The majority of the panel found that the evidence did not meet this standard because Randy Williams' testimony on the critical issue—whether he and Armstrong picked up respondent at the trailer court before or after Gorsuch was killed—was uncorroborated. (App. to Pet. for Cert. at B-8-9)

En banc rehearing was granted to consider whether *Chapman* is the appropriate standard of review for violations of *Doyle*. Eight members of the Court of Appeals agreed that it was, and five agreed that the error in this case was not harmless beyond a reasonable doubt. Chief Judge Cummings, with Judges Wood and Coffey, dissented, stating their agreement with the majority of the Illinois Supreme Court. (App. to Pet. for Cert. at A-17-18) Judge Easterbrook found no fault with the majority's conclusion that the error here was not harmless if judged by the *Chapman* standard, but dissented on the ground that *Chapman* should not apply to violations of *Doyle*, particularly on collateral review. (App. to Pet. for Cert. at A-19-35) Petitioner Greer sought a writ of certiorari, which this Court granted on December 1, 1986.

SUMMARY OF ARGUMENT

I. *Doyle v. Ohio*, 426 U.S. 610 (1976) holds that when a criminal defendant testifies on his own behalf at trial, the prosecution may not use his silence at the time of arrest and after receipt of *Miranda* warnings for impeachment purposes. Violations of *Doyle* are universally reviewed by applying *Chapman v. California*, 386 U.S. 18 (1967), the most stringent harmless error standard, but no court has ever explained why the *Chapman* standard is necessarily the correct one. *Doyle* stems from the Due Process Clause, and claims of a denial of due process are subject to a general requirement that the defendant demonstrate actual prejudice.

A. *Chapman* deals solely with errors affecting specific constitutional provisions, and holds that while some errors of this nature can never be harmless, many are not sufficiently important to justify reversal in every case. In the first category are errors affecting rights, such as the right to trial before an impartial tribunal, which are necessary to the integrity of the factfinding process. In the second category are errors affecting rights, such as the right to remain silent, which do not necessarily disable the factfinding process from achieving its goal of accurate adjudication. A third category of constitutional error, not dealt with in *Chapman*, involves claims based on a fact or a set of facts which do not implicate specific constitutional provisions, but which are said to result in a denial of fundamental fairness in violation of the Due Process Clause. Some claims of this type involve intolerably reprehensible conduct on the part of governmental officials. Others involve circumstances which give rise to an unacceptable risk of inaccurate adjudication. No prejudice need be shown to justify reversal in cases of this type. In most cases arising solely under the Due Process Clause, how-

ever, an error will not be found to rise to the level of constitutional error unless actual prejudice is shown. Actual prejudice is incorporated into the definition of an error which violates due process. This analysis does not involve application of any harmless error standard of review. To demonstrate prejudice, a defendant must show that there is a reasonable probability that, absent the error, the result of the proceeding would have been different.

B. The decision in *Doyle* stems from the Due Process Clause, not the Fifth Amendment, and rests on two premises. The first is that silence at the time of arrest is not probative of the veracity of exculpatory trial testimony. This rationale is not of constitutional dimension, and has been abandoned in subsequent cases. The second premise is that *Miranda* warnings implicitly promise the arrestee that silence will carry no penalty, and it is unfair to so induce silence at the time of arrest and then use it for impeachment purposes at trial. The Court has explicitly held that this rationale is not grounded in the Fifth Amendment.

C. *Chapman* does not apply to violations of *Doyle* because *Doyle* is a due process case, not a Fifth Amendment case. Furthermore, respondent should be required to show actual prejudice because *Doyle* does not involve intolerably reprehensible conduct, nor does it inherently undermine the factfinding process.

II. *Chapman* should not apply at all in federal habeas corpus proceedings because in balancing the interests which compete with the need to enforce constitutional rights strictly, *Chapman* does not take into account the unique and heavy costs associated with collateral review. Since the sole concern of the writ of habeas corpus is the fundamental fairness of the judgment by which the State seeks to maintain an individual in custody, habeas corpus applicants should be required to show actual prejudice regardless of the nature of the claim.

A. The rights afforded by the Constitution serve not only the interests in protecting the innocent against a miscarriage of justice, but also the broader societal interests in individual autonomy and personal privacy. *Chapman* serves to protect the full spectrum of constitutional values, as evidenced by the clear distinction between the standard of harmless error review for constitutional errors as opposed to nonconstitutional errors. Moreover, *Chapman* balances these values against the limited interests which compete on direct review with strict enforcement of constitutional rights.

B. On collateral review, not only do the interests which always compete with strict enforcement of constitutional rights take on greater importance, but additional interests come into play as well. Federal habeas corpus review of state court judgments raises important questions concerning federalism, comity, and finality. When these factors are taken into account, the only interest sufficient to outweigh them is the interest in protecting the innocent against an unjust incarceration. Thus, a prerequisite for habeas corpus relief should be a showing by the applicant that, had the error complained of not occurred, there is a reasonable probability that the outcome would have been different. This standard of review for collateral attacks on state court judgments precludes application of *Chapman*.

III. When the appropriate standard of review is applied to respondent's claim, it is clear that he is not entitled to habeas corpus relief. Crucial to his ability to show a reasonable probability that the outcome would have been different had the *Doyle* error not occurred is his ability to show that there was a compelling reason for the jury to disbelieve Randy Williams. Otherwise it cannot be said that only the *Doyle* error accounts for the jury's choice. The record does not support this assertion. Williams was never shown to have a grudge against re-

spondent, and although he negotiated a favorable plea agreement in exchange for his testimony, his accusation of respondent predated the agreement by more than three months. He had no reason to falsely accuse respondent at that time. Moreover, there was considerable corroboration for Williams' testimony, and the trial judge's conditional curative instruction was later supplemented by a general instruction to disregard questions to which objections were sustained.

ARGUMENT

I.

THE HARMLESS ERROR DOCTRINE OF *CHAPMAN v. CALIFORNIA* DOES NOT APPLY TO VIOLATIONS OF THE RULE OF *DOYLE v. OHIO* BECAUSE THE RULE STEMS FROM THE DUE PROCESS CLAUSE, AND CLAIMS OF A DENIAL OF DUE PROCESS ARE SUBJECT TO A GENERAL REQUIREMENT THAT ACTUAL PREJUDICE BE SHOWN.

The prosecutor's second question on cross-examination of respondent was "[w]hy didn't you tell this story to anybody when you got arrested?" (J.A. 31) Before respondent could answer, defense counsel raised an objection and a sidebar conference was held, after which the trial judge informed the jury that "[t]he objection will be sustained and the jury will be instructed to ignore the last question, for the time being." (J.A. 32) Because respondent had been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) at the time of his arrest for the murder of Neil Gorsuch (C. 556), petitioner acknowledges that this effort to impeach respondent with his prior silence constituted an attempted violation of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle*, this Court held that when a criminal defendant testifies at his trial, the prosecution may not use his silence at the time of arrest and after receipt of *Miranda* warnings to impeach him. The use of post-*Miranda* warnings silence for impeachment purposes, according to *Doyle*, "violate[s] the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619. Adding that the State of Ohio had not raised the possibility that the error was harmless, the Court reversed. *Id.* at 619-620. Since then, every circuit that has considered whether a violation of the rule of *Doyle* requires reversal has assumed that the harmless error doctrine applies, and has selected the most exacting harmless error rule as the standard of review—that established by *Chapman v. California*, 386 U.S. 18 (1967). (*See* App. to Pet. for Cert. at A-7) Not one explains why *Chapman* necessarily supplies the appropriate standard. *See Phelps v. Duckworth*, 772 F.2d 1410, 1421 (7th Cir. 1985) (*en banc*) (EASTERBROOK, J., concurring).

The decision in *Doyle* is based on the Due Process Clause, and, as discussed in Argument I.A, this Court's treatment of cases arising under the Due Process Clause does not involve the application of harmless error standards of review. Rather, this Court looks to the nature of the error complained of to determine whether it involves conduct which is so offensive to basic notions of fairness that it cannot be tolerated in a civilized society, or poses such a threat to the ability of the factfinding process to achieve reliable results that it is inherently prejudicial. If so, the error cannot be found harmless. If not, then the defendant must show that actual prejudice resulted in the sense that there is a reasonable probability that, had the error not occurred, the result of the proceeding would have been different. Arguments I.B and C address the points that *Doyle* is a due process case, and that because violations of *Doyle* do not involve gross unfairness or inherent prejudice respondent should be re-

quired to demonstrate actual prejudice. The Court of Appeals' application of the stringent *Chapman* standard was therefore erroneous.

A. The Definition Of Errors Resulting In A Denial Of Due Process Incorporates A General Requirement That The Defendant Show Actual Prejudice, Thus Making *Chapman* Inapplicable As A Standard Of Review In Due Process Cases.

If anything is clear from this Court's decisions on constitutional issues in criminal cases, it is that "claims of constitutional error are not fungible." *Rose v. Lundy*, 455 U.S. 509, 543 (1982) (STEVENS, J., concurring in the judgment). The standard of review varies according to the nature of the claim and the constitutional right which is implicated. *Chapman* deals solely with errors affecting specific constitutional provisions,[1] and it identifies two types: errors affecting rights which are of such fundamental importance, either to the integrity of the factfinding process or to basic notions of fairness in a free society, that no judgment can stand in any case where those rights have been abridged; and errors affecting rights which are not sufficiently important to justify reversal in every case. As examples of the first category, *Chapman* cites *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel), *Payne v. Arkansas*, 356 U.S. 560 (1958) (use of coerced confession), and *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial before judge with financial interest in the outcome). 386 U.S. at

[1] The specific constitutional provisions contained in the Bill of Rights are, of course, applicable to the states only through the Due Process Clause of the Fourteenth Amendment. By drawing a distinction between errors implicating specific constitutional provisions and those affecting only the right to due process, petitioner does not mean to suggest that there should be an artificial distinction between the analysis of constitutional errors in state cases as opposed to federal cases. Rather, the distinction is between errors affecting rights which have their basis in specific constitutional provisions and those which do not.

23, n. 8. To this list, *Vasquez v. Hillery*, 106 S.Ct. 617 (1986) (racial discrimination in selection of grand jury), and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (directed verdict for prosecution in a criminal jury trial) have been added.

Chapman places the Fifth Amendment right to remain silent in the second category. In *Chapman* itself, the prosecutor had asked the jury to infer guilt from the defendant's failure to testify and exculpate himself, in violation of the Fifth Amendment as construed in *Griffin v. California*, 380 U.S. 609 (1965); this Court held that such an error does not require reversal if the State can prove beyond a reasonable doubt that it was harmless. 386 U.S. at 24. *See also United States v. Hastings*, 461 U.S. 499 (1983) (comments on defendants' failure to testify held harmless beyond a reasonable doubt). The harmless error standard of *Chapman* has since been held to apply to a variety of constitutional errors, all stemming from specific constitutional provisions. *Rose v. Clark*, 106 S.Ct. 3101 (1986) (Sixth Amendment right to jury determination of factual issues); *Delaware v. Van Arsdall*, 106 S.Ct. 1431 (1986) (Sixth Amendment right to confrontation); *Rushen v. Spain*, 464 U.S. 114 (1983) (per curiam) (Sixth Amendment right to be present at trial); *Moore v. Illinois*, 434 U.S. 220 (1977) (Sixth Amendment right to counsel at post-indictment identification procedure); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (arrest in violation of Fourth Amendment); *Milton v. Wainwright*, 407 U.S. 371 (1972) (confession obtained in violation of Sixth Amendment right to counsel); *Chambers v. Maroney*, 399 U.S. 42 (1970) (evidence obtained in violation of Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1 (1970) (Sixth Amendment right to counsel at preliminary hearing).

A third type of constitutional error not dealt with in *Chapman* involves claims based on a fact or a set of facts which do not implicate specific constitutional provisions,

but which are said to result in a denial of fundamental fairness in violation of the Due Process Clause. Some errors of this type require reversal regardless of their impact on the process of adjudication because they involve conduct on the part of government officials so reprehensible that it cannot be tolerated in a civilized society. *Rochin v. California*, 342 U.S. 165 (1952).[2] Others require reversal whether or not any identifiable prejudice has resulted because they give rise to an unacceptable risk that the adjudication of guilt or innocence was inaccurate. *Estelle v. Williams*, 425 U.S. 501 (1976) (accused forced to trial before a jury while wearing prison garb, found inherently prejudicial because it deprived him of the presumption of innocence); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (accused tried in a courtroom dominated by the media, creating a circus atmosphere); *Drope v. Missouri*, 420 U.S. 162 (1975) (accused tried while mentally incompetent).

In most cases arising solely under the Due Process Clause, however, the defendant must show actual prejudice in order to obtain reversal. When errors are alleged which do not implicate specific constitutional guarantees, then prejudice must be shown in order to elevate them to the level of a constitutional violation. Actual prejudice, then, is incorporated into the definition of errors amounting to a violation of due process. Thus, in *United States v. Bagley*, 105 S.Ct. 3375, 3380-3381 (1985), this Court held that a prosecutor's breach of his duty under *Brady v. Maryland*, 373 U.S. 83 (1963) to turn over discoverable information in response to a valid request does not violate due process unless the defendant can show that the information was material in the sense that it gives rise

[2] *Rochin* was actually a case that involved Fourth Amendment concerns, but the Due Process Clause was invoked as the basis for reversal because the exclusionary rule had not yet been applied to the states.

to a reasonable probability that the outcome would have been different. *Cf. United States v. Agurs*, 427 U.S. 97, 104 (1976) (". . . implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."). This degree of materiality of the withheld information is an essential component of a due process claim. The same standard was applied in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982), where the Court held that due process is violated by government deportation of witnesses favorable to the defendant only when he can show that their testimony would give rise to reasonable likelihood that the judgment would have been different. Similarly, when the police use suggestive identification procedures, the defendant must show, first, that the procedure was unnecessarily suggestive, *Simmons v. United States*, 390 U.S. 377, 389 (1968), and second, that there is a reasonable likelihood that the procedure led to misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 113-114 (1977); *Neil v. Biggers*, 409 U.S. 188, 198-199 (1972). Actual prejudice must also be shown when the jury has been given an erroneous instruction, or no instruction, on a necessary element of the offense. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973).[3] Prosecutorial misconduct in closing argument, even of the most egregious sort, does not violate due process absent a showing of actual prejudice. *Darden v. Wainwright*, 106 S.Ct. 2464, 2471-2473 (1986); *Donnelly v. DeChristoforo*,

[3] An exception to this rule would be an instruction calling for the jury to presume a fact which is an essential element of the offense, in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979). The harmless error doctrine of *Chapman* applies to violations of *Sandstrom*. *Rose v. Clark*, 106 S.Ct. 3101 (1986). However, *Sandstrom* has its roots not only in the due process requirement that the prosecution prove every element of the offense beyond a reasonable doubt, but also in the Sixth Amendment right to trial by jury. *Clark*, 106 S.Ct. at 3113 (BLACKMUN, J., dissenting).

416 U.S. 637, 642-643 (1974). Recently, in *Holbrook v. Flynn*, 106 S.Ct. 1340 (1986), a case in which armed, uniformed security guards were stationed behind the defendant during his jury trial, this Court said that

> While, in our supervisory capacity, we might express a preference that officers providing courtroom security not be easily identifiable by jurors as guards, we are much more constrained when reviewing a constitutional challenge to a state court proceeding. All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over. Respondent has failed to carry his burden here.

Id. at 1348 (footnote omitted).

Thus, in the due process cases, the harmless error doctrine of *Chapman* simply does not apply: the circumstances either give rise to an error of such fundamental importance that it cannot be harmless, or the definition of the error, for constitutional purposes, incorporates a requirement that the defendant show actual prejudice. This sort of analysis is not harmless error review, *Darden*, 106 S.Ct. at 2473, n. 15, and this Court has never squarely held that *Chapman* applies to errors implicating only the Due Process Clause.[4]

[4] The Court did invoke *Chapman* in *Rushen v. Spain*, 464 U.S. at 120, a case involving *ex parte* communication between the trial judge and a juror, but it did so without deciding "[w]hether the error was of constitutional dimension . . ." because the petitioner conceded that it was. *Id.* at 117, n. 2. As Justice Stevens pointed out, however, the error clearly was not of constitutional dimension and should have been analyzed as an alleged violation of due process. *Id.* at 123-127 (STEVENS, J., concurring in the judgment). The knowing use of perjured testimony by the prosecution is another

(Footnote continued on following page)

Another type of constitutional claim, which does not fit into any of the previously discussed categories, is a claim of ineffective assistance of counsel. Although such a claim clearly implicates the Sixth Amendment, *Strickland v. Washington*, 466 U.S. 668 (1984) holds that a defendant raising it must first overcome a "strong presumption" that counsel's performance was professionally competent, *id.* at 689, and then show "a reasonable probability . . . sufficient to undermine confidence in the outcome" that absent the errors the result of the proceeding would have been different. *Id.* at 694. This formulation of the test for prejudice was drawn from the due process context: the Court cited *United States v. Agurs*, *supra*, and *United States v. Valenzuela-Bernal*, *supra*. *Id.* It was found to be the appropriate test in ineffective assistance cases because the purpose of the Sixth Amendment guarantee of effective assistance of counsel, like the purpose of the Due Process Clause, is to ensure a fair trial resulting in a reliable, accurate adjudication of guilt or innocence. After noting that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment", the court went on to say that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." 466 U.S. at 685. The appropriate test for actual prejudice in due process

[4] *continued*
example of conduct implicating only the Due Process Clause, *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959), but the standard of review is unclear. In *Bagley*, *supra*, Justice Blackmun speaking for himself and Justice O'Connor, indicated that the language of *Giglio* and *Napue* parallels that of *Chapman*. 105 S.Ct. at 3382, n. 9. However, in *Smith v. Phillips*, 455 U.S. 209 (1982), a majority of the Court placed perjury claims in the category of due process cases requiring the defendant to show actual prejudice. *Id.* at 220, n. 10.

cases, then, is the one articulated in *Strickland* and taken from the due process context. It is whether the defendant can show "that there is a reasonable probability that, but for [the errors complained of], the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In analyzing claims of constitutional error, this Court uses a graduated standard of review, and the selection of a standard depends on the nature of the right involved. The remedy must be tailored to the injury suffered. Thus, it becomes important to identify the nature of the right protected by the rule of *Doyle*.

B. Since *Doyle* Does Not Involve Fifth Amendment Concerns, It Should Be Treated As A Due Process Case.

The decision in *Doyle* rests on two premises. The first is that silence at the time of arrest is not necessarily inconsistent with exculpatory testimony at trial, so the use of silence for impeachment purposes has dubious probative value. Silence is "insolubly ambiguous." 426 U.S. at 617. This reasoning comes from *United States v. Hale*, 422 U.S. 171 (1975), decided the year before *Doyle*, which holds that post-arrest silence may not be used for impeachment purposes. However, *Hale* was decided in the exercise of this Court's supervisory powers over the lower federal courts, not on constitutional grounds, and the fact that *Miranda* warnings were given at the time of arrest was cited as only one of the factors contributing to the conclusion that silence is too ambiguous to be probative. 422 U.S. at 177, 181. Moreover, subsequent cases abandon this strand of *Doyle*'s rationale. In *Jenkins v. Anderson*, 447 U.S. 231 (1980), the Court held that the use of pre-arrest silence for impeachment purposes was permissible because it was probative of the veracity of the defendant's trial testimony, and it did not violate *Doyle* because there

had been no *Miranda* warnings. 447 U.S. at 238-240. The holding in *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam), that use of post-arrest silence is permissible when there have been no *Miranda* warnings, follows from *Jenkins* and similarly abandons the first premise of *Doyle*.

The second premise underlying *Doyle* is that by informing the arrestee that anything he says can be used against him, the *Miranda* warnings implicitly assure him that "silence will carry no penalty", and thus it would be unfair to so induce silence at the time of arrest and then use it to impeach the testimony given at trial. 426 U.S. at 618. In the first place, as the post-*Doyle* cases make clear, this rationale is not rooted in the Fifth Amendment. *Jenkins* reaffirms the principle of *Raffel v. United States*, 271 U.S. 494 (1926) that "the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence" 447 U.S. at 235, even if the prior silence was explicitly based on invocation of the privilege. *Id.* at 236, n. 2. *Fletcher* extends that principle to the use of post-arrest silence. *Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam) holds that voluntary inconsistent post-arrest statements made after receipt of *Miranda* warnings may be used because the defendant had not been induced to remain silent. *South Dakota v. Neville*, 459 U.S. 553 (1983) holds that post-arrest refusal to submit to a blood-alcohol test, after receipt of *Miranda* warnings, may be used against the defendant because the implicit assurance that silence (or, in this case, inaction) will carry no penalty was explicitly retracted, suggesting that the rule of *Doyle* would cease to operate if the *Miranda* warnings were changed. Finally, in *Wainwright v. Greenfield*, 106 S.Ct. 634 (1986), while holding that post-*Miranda* warning silence may not be used as substantive evidence on the issue of sanity, the Court nevertheless emphasized that *Doyle* is a due process case with no Fifth Amendment lineage. *Id.* at 638-639 and n. 7, 640 and n. 10.

Further, the unfairness condemned in *Doyle* has less to do with misleading the jury to the prejudice of the defendant than it does with misconduct by State officials. While this Court has expressed the belief, in *Hale* and *Doyle*, that prior silence is not necessarily inconsistent with exculpatory testimony, and hence not probative of veracity, it has recognized that the states are free to reach a different conclusion. *Fletcher*, 455 U.S. at 605-607; *Jenkins*, 447 U.S. at 239, n. 5. Thus, *Doyle* bars the use of what may well be probative evidence concerning the veracity of a defendant's testimony, and it does so only because the sense of fair play is offended when the prosecutor reneges in the courtroom on a promise implicitly made at the station house. However, prosecutorial misconduct which does not implicate specific provisions of the Bill of Rights is generally regarded as a violation of due process only when the defendant demonstrates actual prejudice. "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Thus, in *Donnelly v. DeChristoforo, supra*, this Court said that

> [w]hen specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial misconduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention.

416 U.S. at 643. Even in cases where the misconduct was egregious in the extreme, the same analysis applies. *Darden v. Wainwright*, 106 S.Ct. at 2471-2473.

The failure to abide by a sense of fair play does not violate the Due Process Clause unless the conduct results

in actual prejudice, *Donnelly v. DeChristoforo*; or is inherently prejudicial, *Estelle v. Williams*; or is so outrageous that it "shocks the sensibilities of civilized society." *Moran v. Burbine*, 106 S.Ct. 1135, 1148 (1986). The question thus becomes, into which of these categories does *Doyle* fit.

C. Since Violations Of *Doyle* Do Not Render The Factfinding Process Inherently Unreliable, Respondent Should Be Required To Show Actual Prejudice.

Under the rubric of the Due Process Clause, this Court has declared that certain practices are so inherently prejudicial to the fairness of a trial that a search for identifiable prejudice on a case-by-case basis is not required in order to justify reversal. It has done so because those practices disable the adversarial system from performing its function of achieving reliable adjudications of guilt or innocence to such a degree that the record produced cannot be trusted as presenting an accurate reflection of the true facts. Thus, actual prejudice need not be shown where the jury convicts a defendant who has been stripped of the presumption of innocence, because the verdict cannot be counted on as resulting from consideration of the evidence adduced at trial, as opposed to official suspicion or other irrelevant matter. In such cases, appellate review is not an adequate remedy. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *Estelle v. Williams*, 425 U.S. at 504-505. The same is true of a verdict following a trial dominated by a mob. *Sheppard v. Maxwell, supra*. Similarly, no reliance can be placed on a verdict following a trial at which the defendant was mentally incompetent because under such circumstances he is unable to participate in the process, depriving it of its adversarial character. *Drope v. Missouri*, 420 U.S. at 171-172. In the sense that these cases speak of due process, it is an innocence-protecting rule of procedure. The breakdown in the system gives rise to an unacceptable risk that the adjudication

of guilt or innocence is not accurate. *Doyle* clearly does not belong in this class because it has nothing to do with the process of adjudicating guilt or innocence and operates, as *Fletcher* and *Jenkins* establish, to exclude what the states would be free to say, had there been no *Miranda* warnings, is probative evidence of guilt.

This Court has also invoked the Due Process Clause substantively, to prohibit practices which, although not undermining the process of adjudication, are inimical to the most basic concepts of fairness. *Rochin v. California, supra.* In this regard, the Court has condemned vindictive prosecution and sentencing in retaliation for the exercise of statutory or constitutional rights. *United States v. Goodwin*, 457 U.S. 368, 372-374 (1982). The unfairness condemned in *Doyle*, however, does not concern punishing a defendant for exercising his right to remain silent. *Jenkins*, 447 U.S. at 236-238. Moreover, the substantive use of the Due Process Clause has its limits, as the Court recognized in *Rochin*. 342 U.S. at 170-172. For example, Justice Powell, concurring in the result in *Parratt v. Taylor*, 451 U.S. 527 (1981), criticized the majority's ruling that negligent conduct by state officials was actionable under 28 U.S.C. §1983 as a violation of due process, stating his view that the substantive reach of the Due Process Clause does not go beyond "intentional and malicious" behavior. *Id.* at 552-553. This became the view of the majority in *Daniels v. Williams*, 106 S.Ct. 662, 664-665 (1986), which partially overruled *Parratt.*

In no sense can a violation of *Doyle* be considered the sort of malicious conduct which is so reprehensible that no civilized society can tolerate it. Indeed, every circuit, by applying a harmless error standard of review to *Doyle* violations, has said as much. While a broken promise may be cause for concern, it does not necessarily follow that fundamental fairness has been denied. *Moran v. Burbine*, 106 S.Ct. at 1147-1148 (holding that deliberate police de-

ception of a suspect's lawyer as to whether they would interrogate her client in her absence did not violate due process).

Accordingly, the appropriate standard of review for violations of the rule of *Doyle* is that used by this Court in the majority of cases arising under the Due Process Clause. Since the rule of *Doyle* is not aimed at unacceptably reprehensible behavior and does not protect the innocent, respondent should be required to show actual prejudice.

II.

THE HARMLESS ERROR RULE OF *CHAPMAN v. CALIFORNIA* SHOULD NOT BE APPLIED IN FEDERAL HABEAS CORPUS PROCEEDINGS, BECAUSE THE INTERESTS WHICH COMPETE WITH THE POLICY OF STRICT ENFORCEMENT OF CONSTITUTIONAL RIGHTS ON COLLATERAL REVIEW OUTWEIGH THE NEED FOR STRICT ENFORCEMENT.

By its holding in *Chapman v. California*, 386 U.S. 18 (1967) that even some constitutional errors may be harmless, this Court acknowledged that constitutional rights must sometimes give way to competing interests. The strict standard of review established in *Chapman* serves the dual purpose of accommodating those interests without diluting the importance to society of constitutional protections. However, since *Chapman* was decided on direct review, it does not take into account the unique problems associated with collateral attacks in federal court on state court convictions. When those problems are added to the balance, a recalibration of the competing interests is required.

The central concern of the writ of habeas corpus is the fundamental fairness of an individual judgment by which the State seeks to maintain an individual prisoner in custody, and not the full spectrum of societal values embodied in the Constitution and served by the *Chapman* standard.

See Strickland v. Washington, 466 U.S. 668, 697 (1984). The appropriate standard for collateral review of any constitutional claim which might be found harmless on direct review, then, is whether the habeas applicant can show a reasonable likelihood that, had the error not occurred, the jury would have entertained a reasonable doubt as to his guilt. *Strickland*, 466 U.S. at 689. This standard properly balances the governmental interests in finality of judgments and harmonious federal-state relations with the applicant's interest in release from a fundamentally unjust incarceration. Thus, even assuming that a violation of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976) is a constitutional error which would be subject to harmless error review under *Chapman* on direct appeal, respondent should be required in this habeas corpus proceeding to show actual prejudice sufficient to undermine confidence in the outcome.

A. The *Chapman* Standard Reflects A Concern Not Just For The Fairness And Accuracy Of The Adjudication Of Guilt Or Innocence, But For The Broader Values Embodied In The Constitution As Well.

The rights afforded by the Constitution to those accused of crimes serve values that go beyond protecting the innocent against a miscarriage of justice. They also serve the broader societal interests in a humane system of criminal justice, and in individual autonomy and personal privacy. *Vasquez v. Hillery*, 106 S.Ct. 617, 622 (1986); *Stanford v. Texas*, 379 U.S. 476, 481-485 (1965). Vindication of those values, however, does not come without a price. The guilty may escape punishment, probative evidence may be kept from the trier of fact, and the reversal of convictions requires expenditure of the limited resources of the criminal justice system on affording retrials when they might be better spent on affording first trials to others. *United States v. Mechanik*, 106 S.Ct. 938, 942 (1986); *United States v. Leon*, 468 U.S. 897, 907-908 (1984);

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-424 (1971) (BURGER, C.J., dissenting). The remedy for a constitutional violation is frequently a windfall for the defendant which is disproportionate to the harm done to him, but because of the surpassing importance of the values reflected by certain rights, they are strictly enforced. This policy finds its expression in *Chapman*, which requires the prosecution, as the beneficiary of a constitutional error, to prove it harmless beyond a reasonable doubt in order to preserve the conviction on direct review.

That this standard was fashioned to serve the full spectrum of constitutional values, and not just the accuracy of the determination of guilt, can be seen in the difference between harmless error review for constitutional errors on the one hand and nonconstitutional errors on the other. Errors of constitutional dimension are harmless only if the prosecution can prove them harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. The burden of persuasion is on the beneficiary of the error, and the proper focus of the inquiry is on whether there is any possibility that the error contributed to the verdict. *Id.*; *Schneble v. Florida*, 405 U.S. 427, 432 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969). Overwhelming evidence of guilt, untainted by the error, is the minimum requirement to prove harmlessness. *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1438 (1986); *United States v. Hastings*, 461 U.S. 499, 510-511 (1983). This burden is "considerably more onerous than the standard for nonconstitutional errors adopted in *Kotteakos v. United States*, 328 U.S. 750 (1946)." *United States v. Lane*, 106 S.Ct. 725, 730, n. 9 (1986). The rule of *Kotteakos*, codified in 28 U.S.C. §2111, is that judgments may not be reversed based on errors which do not affect the substantial rights of the parties. 328 U.S. at 765. Reversal is not warranted unless "actual prejudice" is shown. *Lane*, 106 S.Ct. at 732.

The difference between these two standards cannot be explained in terms of the prejudicial effect on the determination of guilt caused by constitutional errors as opposed to nonconstitutional errors. Indeed, almost 20 years after *Chapman* was decided, six circuits were applying a *per se* rule of reversal for the nonconstitutional error of misjoinder because misjoinder was deemed inherently prejudicial. *Lane*, 106 S.Ct. at 727, n. 1. Thus, the only consideration which distinguishes *Chapman* from *Kotteakos* is heightened sensitivity where the broader societal values embodied in the Constitution are concerned.

B. Since The Central Concern Of The Writ Of Habeas Corpus Is The Fundamental Fairness Of The Trial, And Because Collateral Review Entails Significant Costs Not Associated With Direct Review, *Chapman* Is Not An Appropriate Standard To Apply In Habeas Corpus Proceedings.

The balance struck by the Court in *Chapman* in formulating the standard for harmless error review of constitutional claims takes account of the competing interests present on direct review. *Delaware v. Van Arsdall*, 106 S.Ct. at 1436-1437; *United States v. Hastings*, 461 U.S. at 508-509. Collateral review, however, is another matter. Once the process of trial and direct appeal has run its course, the interests which compete with constitutional values take on greater importance. For example, the Fourth Amendment is enforced at trial by application of the exclusionary rule, *Mapp v. Ohio*, 367 U.S. 643 (1961), and on direct appeal by application of *Chapman*. *Franks v. Delaware*, 437 U.S. 154, 162 (1978). It is not enforced on collateral review because the beneficial effects of enforcement at that stage are marginal, and the costs too high. *Stone v. Powell*, 428 U.S. 465, 489-496 (1976). On collateral review, the only concern sufficient to outweigh the costs of enforcing the Fourth Amendment is the concern for an adequate corrective process in the state courts for the litigation of Fourth Amendment claims. *Id.* at 494.

In addition, significant interests come into play on collateral review which are not present on direct review. At least since *Brown v. Allen*, 344 U.S. 443 (1953), the Habeas Corpus Act has been construed as conferring federal jurisdiction to review the final judgment of a state court of competent jurisdiction which has determined the merits of a constitutional claim after a full and fair hearing. This power exists even with respect to claims that were procedurally defaulted in state court, or for which state court remedies are still available. *Fay v. Noia*, 372 U.S. 391, 417-420, 424-427 (1963). However, the power of a single federal judge to void a conviction entered in state court, after rigorous scrutiny at every level of the state judiciary, raises important questions concerning federalism, comity, and finality. *Rose v. Lundy*, 455 U.S. 509, 518-520 (1982); *Sumner v. Mata*, 449 U.S. 539, 543-546, 550 (1981); *Wainwright v. Sykes*, 433 U.S. 72 (1977). *See also* Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U.Chi.L.Rev. 142, 146-151 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441, 444-462 (1963).

Addressing these concerns has been a process of balancing competing interests. For instance, while this Court has never retreated from the pronouncement in *Fay* that habeas jurisdiction extends to all constitutional claims regardless of exhaustion or procedural default problems, *Francis v. Henderson*, 425 U.S. 536, 538-539 (1976), it has reassessed the considerations which restrain the exercise of that jurisdiction. Thus, in *Rose v. Lundy, supra*, the Court held that even claims for which state remedies have been exhausted could not be considered if presented in a petition that also contained unexhausted claims, and in *Francis v. Henderson* and *Wainwright v. Sykes* it replaced the deliberate bypass test of *Fay* for procedurally defaulted claims with the cause and prejudice test. It has done so in the interest of comity and finality. *Smith v.*

Murray, 106 S.Ct. 2661, 2665-2666 (1986); *Murray v. Carrier*, 106 S.Ct. 2639, 2645 (1986); *Engle v. Isaac*, 456 U.S. 107, 126-128 (1982); *Rose v. Lundy*, 455 U.S. at 518.

It must be remembered, though, that the costs in terms of comity and finality inhere in any habeas case, whether or not it involves questions of exhaustion or procedural default. Those problems serve only to elevate the costs. *Engle*, 456 U.S. at 128. Intrusive collateral review of state court convictions frustrates deterrence and rehabilitation because it detracts from finality; it diminishes the significance of the trial as the focal point of the criminal process; and it undermines the morale of state court judges, who are sworn to uphold the Constitution just as federal judges are. *Id.* at 127-128; *Wainwright v. Sykes*, 433 U.S. at 90; *Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (POWELL, J., concurring). *See also* Friendly, at 145-146; Bator, at 451-452. Liberal allowance of the writ results in costly retrials, and often allows the guilty to escape just punishment because the evidence has grown stale over the lapse of time. *Engle*, 456 U.S. at 127-128. All of these considerations suggest that *Chapman*, which did not take them into account, is not the appropriate standard of review on collateral attack. Unlike direct review, where the full spectrum of constitutional values must be considered if they are ever to be considered, "fundamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. at 697. A trial, though not perfect, is fundamentally fair if "evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding"; if the accused has competent counsel to assist him; and if the verdict results from consideration of properly admitted evidence and not improper influences. *Id.* at 685, 689. Moreover, in habeas corpus proceedings, "the burden of showing essential unfairness [must] be sustained by him who claims such injustice and

seeks to have the result set aside, and . . . it [must] be sustained not as a matter of speculation but as a demonstrable reality." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942). *Cf. Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution"); *Brown v. Allen*, 344 U.S. at 458, n. 6 ("the burden of overturning the conviction rests on the applicant . . .").[5]

That *Strickland v. Washington, supra*, supplies the approprate standard of review follows from the near-identity of interests protected by the Habeas Corpus Act and the Sixth Amendment guarantee of effective assistance of counsel.

> In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . .

Strickland, 466 U.S. at 684-685 (citations omitted).

> The principles governing ineffective assistance claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As

[5] This Court's decisions make clear that *Chapman* has never been considered sacrosanct on collateral review. Regardless of the nature of a constitutional claim that has been procedurally defaulted in state court, a habeas applicant, even if he can show cause for the default, must also show "actual prejudice." *Engle*, 456 U.S. at 129; *United States v. Frady*, 456 U.S. 152, 170 (1982). If he cannot show cause, or if he presents his claim in a successive petition, he must show more than actual prejudice. He must show a colorable claim of factual innocence. *Smith v. Murray*, 106 S.Ct. at 2668; *Murray v. Carrier*, 106 S.Ct. at 2650; *Kuhlmann v. Wilson*, 106 S.Ct. 2616, 2627 (1986) (plurality opinion).

> indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. . . . An ineffective assistance claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus . . . no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Id. at 697-698 (citations omitted). Where the "overriding concern [is] with the justice of the finding of guilt", *United States v. Agurs*, 427 U.S. 97, 112 (1976), the *Strickland* standard is "sufficiently flexible", *United States v. Bagley*, 105 S.Ct. 3375, 3384 (1985) to provide the proper balance between the governmental interests in comity and finality and the habeas applicant's interest in release from an unjust incarceration. Accordingly, respondent should be required to show a reasonable likelihood, sufficient to undermine confidence in the result, that the prosecutor's violation of the rule of *Doyle* affected the outcome of the trial.

III.

THE VIOLATION OF THE RULE OF *DOYLE v. OHIO* IN THIS CASE DOES NOT GIVE RISE TO A REASONABLE PROBABILITY THAT, BUT FOR THE ERROR, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

While this Court does not ordinarily undertake its own review of the record to determine the presence or absence of prejudice, *see Rose v. Clark*, 106 S.Ct. 3101, 3109 (1986); *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1438 (1986), the task is facilitated in this case by the analyses contained in five prior opinions, setting forth the essentially undisputed facts relevant to the inquiry. *Cf. United*

States v. Hastings, 461 U.S. 499, 510 (1983). The majority of the Court of Appeals found that "[t]he crux of this trial was whether the jury believed the Williamses or believed Miller" on the one critical point of departure in their testimony—did Randy Williams and Butch Armstrong pick respondent up at the trailer court before or after Neil Gorsuch was murdered. (App. to Pet. for Cert. at A-14) This was also the view of the case expressed by the prosecutor and the trial judge. (J.A. 46, 49) Since there was little in the way of corroboration for Randy Williams' testimony on this point, and none for respondent's,[6] the Court of Appeals, applying *Chapman v. California*, 386 U.S. 18 (1967), saw the question before it as whether it could find "beyond a reasonable doubt that the prosecutor's comment had no effect on the jury's assessment of Miller's credibility, and hence on the jury's verdict." (App. to Pet. for Cert. at A-14) However, when the appropriate standard of review is applied, the question becomes not only whether respondent's credibility was damaged, but also whether he can show that the jury probably would have believed him instead of Williams had he not incurred that damage. Unless the record reveals some compelling reason for the jury to disbelieve Randy Williams, it cannot be said that, to a reasonable probability, the prosecutor's attempted violation of the rule of *Doyle v. Ohio*, 426 U.S. 610 (1976) accounts for their choice.

The Court of Appeals viewed Williams' testimony as "inherently unreliable" because he was an accomplice, and

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[6] Rick Williams did corroborate his brother's testimony when he testified that respondent admitted participating in the murder. (Vol. VI, 173-174) The Court of Appeals characterized this as "indirect evidence" of respondent's involvement. (App. to Pet. for Cert. at A-13, n. 6) Regardless of the characterization, however, it is at least noteworthy that there was some corroboration for Williams' testimony concerning who participated in the murder while there was none for respondent's denial of involvement.

accomplice testimony is "often motivated by factors such as malice toward the accused and a promise of leniency or immunity." (App. to Pet. for Cert. at A-14) However, juries can only judge the credibility of witnesses based on the information they are provided. If Williams' testimony was vulnerable to attack on grounds of malice or self-interest, it was still necessary to bring those grounds out on cross-examination in order for the jury to give them any weight. In the entire day-long cross-examination of Williams, no testimony was elicited to establish that he harbored any kind of grudge against respondent. He was cross-examined concerning his plea agreement with the prosecutor (J.A. 6-7), but it would require a considerable stretch of the imagination to conclude that the agreement provided a motive for him to falsely accuse respondent, because he accused respondent more than three months before the agreement was reached. Williams and respondent were arrested at 5:00 a.m. on Sunday, February 10, 1980, and Williams made a statement implicating himself, respondent, and Butch Armstrong shortly after noon the same day. (Vol. VI, 44, 60-61) He was charged with murder, aggravated kidnapping, kidnapping, and armed robbery. (J.A. 6) He did not plead guilty to the kidnapping charge until May 24, 1980 (C. 276), and he was still listed as a defendant in this case along with respondent and Armstrong on the caption of pleadings filed a few days earlier. (C. 195) From this, it is evident that no agreement was discussed at the time of the February 10 statement. Thus, to believe that the agreement which was eventually reached provided a motive to falsely accuse respondent attributes to Williams the extraordinary prescience to foresee, seven hours after his arrest, that a statement implicating himself as well as respondent in a murder would ultimately work to his advantage. This is, to say the least, an unreasonable belief. Moreover, if respondent was telling the truth—if the murder was committed by Williams and Armstrong—Williams could have

negotiated an agreement based on his testimony against Armstrong alone. He could not possibly have believed that there was anything to be gained by introducing into his account a totally extraneous third culprit whom he knew to be innocent. In short, Williams had no reason at the time of his arrest to lie about respondent's involvement in the murder.

Furthermore, under the appropriate standard of review, the other matters considered by the Court of Appeals are cast in a different light. While it is true that the balance of the State's case provided no direct corroboration for Williams' testimony that respondent participated in the murder, it is also true, as the Illinois Supreme Court found (App. to Pet. for Cert. at D-5-6), that the evidence corroborated Williams in virtually every other respect. There was nothing about Williams' testimony which was at odds with the verifiable facts, and thus no reason for the jury to disbelieve him based on the evidence presented. The trial court's curative instruction—that the jurors were to "ignore that last question, for the time being" (J.A. 32)—although ambiguous, was clarified at the end of the case by the general instruction that the jury "should disregard questions . . . to which objections were sustained." (J.A. 47)[7] Finally, the Court of Appeals expressed concern for the damaging effects of the error resulting not only from its occurrence but from its timing. (App. to Pet. for Cert. at A-12-13) However, the jury

[7] That the initial instruction was conditional was due to the fact that neither the attorneys nor the trial judge appeared to be aware of *Doyle*. The judge stated that he would sustain the objection, but check for authority during the cross-examination and allow the question to be asked if he could determine that it was proper. (J.A. 32) He later determined that it was not, and so informed counsel at a sidebar conference. (J.A. 43) Defense counsel did not ask for a more definite instruction at that time. Respondent testified on the morning of June 9, 1980, the general instructions were given that afternoon, and the verdicts returned that evening.

might not have necessarily viewed respondent's post-arrest silence as impeaching, because respondent testified on direct examination that although he knew about the murder from Williams and Armstrong, he had agreed not to tell anyone about it:

> I asked 'em if Rick knew about it, and Randy said no, and "Butch", then, he said he thought they oughtta' tell Rick about it, 'cause "Butch" said if the police came, he was gonna deny ever bein' with the dude and he said Randy should do the same thing and they oughtta' tell Rick so he would say the guy wasn't with 'em.
>
> * * *
>
> "Butch" just told me to make sure I don't say nothin' to nobody about and I told him I wouldn't.

(J.A. 14-15)

Randy Williams' testimony was plausible and consistent with the other evidence. He had no reason to lie about respondent's involvement, especially since he could just as easily have negotiated a plea agreement based on his testimony against Armstrong alone if respondent was not actually involved. Under these circumstances, the jury had no compelling reason to disbelieve Williams. Therefore, it cannot be said that the *Doyle* violation was their only reason not to believe respondent. Accordingly, the judgment of the Court of Appeals awarding respondent a writ of habeas corpus should be reversed.

CONCLUSION

Doyle v. Ohio, 426 U.S. 610 (1976) is based solely on the Due Process Clause, and attaches a constitutional label to a set of facts that does not otherwise implicate constitutional rights. In such cases, the harmless error doc-

trine of *Chapman v. California*, 386 U.S. 18 (1967) does not apply, because the defendant must show that the error resulted in actual prejudice in order to support a claim that it violated due process. Alternatively, even if the stringent *Chapman* standard is the appropriate one to apply on direct appeal for violations of *Doyle*, the cost of such strict enforcement on collateral review outweighs the benefits. The principle concern of the writ of habeas corpus is the fundamental fairness of the judgment by which the State seeks to maintain an individual in custody. Regardless of the nature of the claim, the habeas applicant must demonstrate actual prejudice in order to show that his incarceration is fundamentally unfair. For these reasons, the Court of Appeals erred in applying *Chapman* in this case.

Finally, because the record does not support the assertion that, absent the *Doyle* violation, the jury would have entertained a reasonable doubt as to respondent's guilt, he is not entitled to habeas corpus relief. The judgment of the Court of Appeals should therefore be reversed.

Respectfully submitted,

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